

**APR 11 2006**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE LUIS AGUILAR-MENDEZ,

Defendant - Appellant.

No. 04-10491

D.C. No. CR-04-00113-1-RLH

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the District of Nevada  
Roger L. Hunt, District Judge, Presiding

Submitted April 5, 2006<sup>\*\*</sup>

Before: HAWKINS, McKEOWN, and PAEZ, Circuit Judges.

Jose Luis Aguilar-Mendez appeals from the sentence imposed following his guilty-plea conviction for unlawful reentry after deportation in violation of 8 U.S.C. § 1326.

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Aguilar-Mendez contends that the district court violated his constitutional rights by making an upward adjustment under U.S.S.G. § 2L1.2(b)(1)(A) for a prior drug trafficking offense for which a sentence exceeding 13 months was imposed. He contends that a jury should have determined the nature of the prior conviction and the length of the sentence. This contention is foreclosed by *United States v. Esparza-Gonzalez*, 422 F.3d 897, 907 (9th Cir. 2005).

Because Aguilar-Mendez was sentenced under the then-mandatory Sentencing Guidelines, and we cannot reliably determine from the record whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory, we remand to the sentencing court pursuant to *United States v. Ameline*, 409 F.3d 1073, 1084 (9th Cir. 2005) (en banc). *See United States v. Moreno-Hernandez*, 419 F.3d 906, 916 (9th Cir. 2005).

**REMANDED.**